

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE

Assigned on Briefs March 28, 2006

**STATE OF TENNESSEE v. CAROLYN BERNARD**

**Appeal from the Criminal Court for Sullivan County**  
**No. S45,715 & S45,290 Phyllis H. Miller, Judge**

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**No. E2005-01546-CCA-R3-CD - Filed April 12, 2006**

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The appellant, Carolyn Bernard, pled no contest to charges of aggravated burglary, theft of property over \$1,000 and failure to appear in January of 2002. As a result, the appellant was sentenced to an effective sentence of three years. The trial court placed the appellant on probation with specified conditions. In December of 2002, the appellant was charged with leaving the scene of an accident and committing a registration violation. A probation violation warrant was subsequently issued. The trial court revoked the appellant's probation, ordered her to serve sixty days in incarceration, then reinstated the appellant to intensive probation. On March 7, 2005, a second probation violation warrant was issued against the appellant for violating the terms and conditions of her probation. The appellant pled guilty to violating one of the special conditions of her probation. After a hearing, the trial court determined that the appellant violated several additional conditions of her probation. As a result, the trial court revoked the appellant's probation and ordered her to serve the three-year sentence in the Department of Correction. The appellant appeals the trial court's decision to revoke her probation. Because the trial court did not err in revoking the appellant's probation, we affirm the judgment of the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is Affirmed.**

JERRY L. SMITH, J., delivered the opinion of the court, in which ALAN E. GLENN, and J. C. McLIN, JJ., joined.

Richard A. Tate, Blountville, Tennessee, for the appellant, Carolyn Bernard.

Paul G. Summers, Attorney General and Reporter; David E. Coenen, Assistant Attorney General; Greeley Wells, District Attorney General; and J. Lewis Combs, Assistant District Attorney General, for the appellee, State of Tennessee.

## OPINION

In August of 2001, the appellant was indicted for aggravated burglary and theft of property over \$1,000 for allegedly entering the home of Craig Blye without his effective consent with the intent to commit theft and for allegedly removing items from the house with a value in excess of \$1,000. The appellant failed to appear for a court date in relation to the indictment and was subsequently charged with failure to appear. On January 23, 2002, the appellant pled no contest to aggravated burglary, theft of property over \$1,000 and failure to appear. As a result, the trial court sentenced the appellant to concurrent sentences of three years for aggravated burglary, two years for theft of property over \$1,000 and one year for failure to appear. The trial court further ordered that the appellant serve her sentence on probation. The trial court entered a "Probation Order" that set forth the conditions of the appellant's probation. Among other things, the Probation Order required the appellant to: (1) obey the laws of the United States and any municipal ordinances; (2) report all arrests and traffic violations immediately to the probation officer; (3) work at a lawful occupation and support her dependents to the best of her ability; (4) inform her probation officer of any change in residence or employment and get permission prior to leaving the State; (5) allow her probation officer to visit her home, employment site and carry out all instructions from the probation officer; (6) refrain from using intoxicants, narcotic drugs and marijuana; (7) pay all fees as required; (8) refrain from entering an establishment whose prime purpose is to sell alcohol and submit to drug screens as directed; (9) submit to random drug screens, alcohol and drug treatment, maintain full time employment and have no contact with the co-defendant.

On December 14, 2002, the appellant was charged with leaving the scene of an accident and committing registration violation. On March 28, 2003, a probation violation warrant was issued against the appellant, setting forth numerous probation violations. The warrant alleged that the appellant: (1) failed to obey the laws of Tennessee by being charged with violating the registration laws and leaving the scene of an accident; (2) failed to inform her probation officer of a change in residence; and (3) failed to pay required fees and court costs as instructed. According to the record, the trial court revoked the appellant's probation on October 31, 2003, and ordered her to serve sixty days in incarceration. The trial court then reinstated the appellant to intensive probation.

On March 7, 2005, a second probation violation warrant was issued against the appellant for the following violations:

Violation of rule #4, "I will work at a lawful occupation and support my dependents, if any, to the best of my ability," to wit; the defendant has failed to obtain and maintain employment from April, 2004 through September 14, 2004, and from November, 2004, through February, 2005.

Violation of rule #6, "I will report [sic] allow my probation officer to visit my home, employment site, or elsewhere, and will carry out all lawful instructions she gives

me..[sic]" to wit; the defendant has often moved from one place to another and has not given truthful information to her probation officer regarding her current address. She has given her mother's address as her own, however her mother states she has not [sic] idea where the defendant is staying. As of this date, the offender's current address is unknown and she is not living at the address listed on her reporting form.

Violation of Special Conditions, "The defendant shall attend and complete alcohol and drug counseling," to wit; the defendant has failed to attend or complete alcohol and drug counseling.

The trial court held a hearing on June 20, 2005, on the second probation violation warrant. At the hearing, the appellant pled guilty to the violation of special conditions. She admitted that she failed to attend or complete alcohol and drug counseling. As a result, the trial court found her guilty of violating the special conditions of her probation.

Pearl Levine, the appellant's probation officer, testified that the appellant violated rule #4 by failing to obtain and maintain employment from April 2004 through September 14, 2004, and from November 2004 through February 2005. Ms. Levine explained:

Violation of Rule No. 4 in regards to working to a lawful occupation during April, 2004 through September, 2004, I do have reporting forms dating back, April, that only one month it lists her having obtained a job. She reported on September the 16<sup>th</sup> and stated that on September the 15<sup>th</sup> that she had started working at Cooper Standard, which is a plant in Rogersville; however when she reported on October the 7<sup>th</sup> she was no longer working there and it probably was temporary work but we're talking about from September to October and there are no other employments listed on reporting forms . . . .

We had several conversations about her employment and at one point she was supposed to be working at a local business store, establishment, which was a relative's establishment, and I went to said establishment several times and was told that she wasn't there or she was called in when she was needed but didn't get any proof of it, that's what I needed, some type of proof of income or proof of working. At another time she was supposed to be working in Johnson City or Kingsport doing some work for somebody but I never got proof and never got the information so that I could call to get the proof.

Ms. Levine also testified that the appellant violated rule #6 because the appellant often moved from one place to another and did not give truthful information to her probation officer regarding her current address. She explained:

I had multiple problems there in that one day I went to her house twice in one day and I went like three days in a row and left an orange card to call me and eventually,

like the last of the week, she called to say that she was going through another door, entering into another door, so therefore she didn't get the orange note. I called even up, last week I called on 6/16 at 1:20 p.m. and her son said that she was at a neighbor's house and I said well I will call back, and I did call back but I'm unable to get her and last February she continued to say she was living at her mother's and I called her mother and her mother said, "I haven't seen her, I don't know where she's living," so you know, I had no other - I went to the residence she was supposed to be living [at] and I called her mother's residence so I didn't know anything else to do.

The appellant took the stand at the hearing. She admitted that she violated the special conditions of her probation by not attending and completing alcohol and drug classes, but informed the court that she signed up for a program about one week prior to the hearing. The appellant claimed that she worked "at different times for temporary services and I worked for different people like stripping floors and just, you know, doing different odd jobs . . . ." However, the appellant claimed that she was "always looking for a job." The appellant admitted that where the reports were left blank "she wasn't working" and that approximately ninety-five percent of the reports were blank in the section for employment. The appellant also admitted that she never really worked full time during her probationary period. She informed the court that she got a job at Hardee's in Rogersville about one week prior to the hearing.

Following the presentation of the evidence, the trial court made the following findings:

All right, your probation is revoked. Now, the reason is, is because you can . . . get a job the week before you come to court for the hearing. You can sign up, get enrolled in alcohol and drug treatment the week before you come in for the hearing. You were revoked once before and placed back on probation for essentially the same thing. The only thing that was that time you were charged with leaving the scene of an accident and violation of registration. But the other time, the failure to work at a lawful occupation, failure to inform probation officer of change of address, failure to pay required fees and court costs and of course now you've signed up with a contract with the State on that issues . . . . So now you're ordered to serve your sentence, three years, Range I standard offender in the Tennessee Department of Corrections.

The trial court subsequently issued an order determining that the appellant had violated rules #4, #5, #6 and #9 of her probation. The appellant filed a timely notice of appeal and presents one issue for our review: whether the trial court erred in revoking her probation.

### Analysis

The appellant contends that "the trial court abused its discretion by revoking her probation and ordering her to serve her sentence." Specifically, the appellant argues that she "substantially

complied” with the terms of her probation and that the trial court’s failure to “give weight to her otherwise positive performance of the requirements of probation constitute an abuse of discretion.” The State disagrees, arguing that the appellant “clearly violated her probation” in numerous ways.

A trial court may revoke probation and order the imposition of the original sentence upon a finding by a preponderance of the evidence that the person has violated a condition of probation. Tenn. Code Ann. §§ 40-35-310 & -311. After finding a violation of probation and determining that probation should be revoked, a trial judge can: (1) order the defendant to serve the sentence in incarceration; (2) cause execution of the judgment as it was originally entered, or, in other words, begin the probationary sentence anew; or (3) extend the probationary period for up to two years. See Tenn. Code Ann. §§ 40-35-308(c) & -311(e); State v. Hunter, 1 S.W.3d 643, 647-48 (Tenn. 1999).

The decision to revoke probation rests within the sound discretion of the trial court. State v. Mitchell, 810 S.W.2d 733, 735 (Tenn. Crim. App. 1991). Revocation of probation and a community corrections sentence is subject to an abuse of discretion standard of review, rather than a de novo standard. State v. Harkins, 811 S.W.2d 79, 82 (Tenn. 1991). An abuse of discretion is shown if the record is devoid of substantial evidence to support the conclusion that a violation of probation has occurred. Id. The evidence at the revocation hearing need only show that the trial court exercised a conscientious and intelligent judgment in making its decision. State v. Leach, 914 S.W.2d 104, 106 (Tenn. Crim. App. 1995). Further, “[i]t is well established that trial courts have broad discretion in determining the admissibility of evidence, and their rulings will not be reversed absent an abuse of that discretion.” State v. McLeod, 937 S.W.2d 867, 871 (Tenn. 1996). Moreover, a defendant who is already on probation is not entitled to an additional grant of probation or some other form of alternative sentencing. State v. James Cravens, No. M2002-01216-CCA-R3-CD, 2003 WL 22282174, at \*2 (Tenn. Crim. App., at Nashville, Oct. 2, 2003), perm. app. denied (Tenn. Mar. 8, 2004).

A trial court has statutory authority to admit trustworthy and probative evidence, including hearsay, for sentencing purposes. Tenn. Code Ann. § 40-35-209(b); State v. Flynn, 675 S.W.2d 494 (Tenn. Crim. App. 1984); State v. Chambliss, 682 S.W.2d 227 (Tenn. Crim. App. 1984). “Reliable hearsay” is admissible in a probation revocation hearing so long as the opposing party has a fair opportunity to rebut the evidence. Tenn. Code Ann. § 40-35-209(b). The Sentencing Act provides, however, that no evidence secured in violation of the constitution of the United States or of Tennessee may be admitted. Tenn. Code Ann. § 40-35-209(b).

At the hearing, the appellant pled guilty to violating the special conditions of her probation by failing to complete alcohol and drug treatment. Further, Ms. Levine testified as to the numerous ways the appellant violated her probation by failing to maintain employment, failing to report her change in residence, failing to report truthfully and failing to submit to random drug screens. The record also indicates that this was the appellant’s second warrant for violation of probation and that she was given another chance at probation in 2003 after the first warrant was filed. Given the proof in the record of the appellant’s failure to comply with the conditions of her probation, we conclude that the trial court did not abuse its discretion in revoking the appellant’s probation and ordering her to serve the sentence in incarceration.

Conclusion

For the foregoing reasons, the judgment of the trial court is affirmed.

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JERRY L. SMITH, JUDGE